Supreme Court, U.S.
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No. 06-1221

In the Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,
Petitioner,

v.

ELLEN MENDELSOHN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption.

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STATEMENT OF THE CASE

The Proceedings Below

Respondent Ellen Mendelsohn worked for Petitioner Sprint from 1989 until November 2002, when Sprint terminated her as part of an ongoing company-wide reduction in force. At the time, Mendelsohn was fifty-one years old and the oldest, most-experienced manager in her unit. Mendelsohn brought this action under the Age Discrimination in Employment Act, alleging that Sprint had selected her for the RIF because of her age. (Pet. App. 2a).

Before trial, Sprint filed a motion *in limine* to sharply limit the evidence Mendelsohn could introduce in support of her discrimination claim. Sprint argued that Mendelsohn should be barred from introducing evidence of discrimination by any company supervisor or manager except a single official, Paul Reddick. (*Id.*). Reddick purportedly had made the final decision for Sprint to select Mendelsohn for termination. The motion was directed in particular at preventing Mendelsohn from calling as witnesses 5 individuals whom Mendelsohn had listed as potential witnesses. All witnesses listed were individuals over 40 who had worked at the same Sprint headquarters in Kansas City as did Mendelsohn, and who had been terminated under the same RIF within a year of Mendelsohn's own dismissal. The disputed witnesses would have testified to facts similar to Mendelsohn, allowing the inference that they were victims of age discrimination. Sprint did not object to some specific portion of their proposed testimony; rather, it argued that Tenth Circuit case law created a blanket prohibition on

testimony about acts of discrimination by any Sprint official other than Reddick.[1]

The district court granted the motion, with scant explanation, allowing only evidence of discriminatory acts by Reddick, and barring any evidence "that Sprint has a pattern and practice, culture or history of age discrimination." (Pet. App. 3a). That Order preordained that the 5 disputed witnesses could not take the stand; it also precluded Mendelsohn herself from testifying that there was a general atmosphere of age discrimination at the headquarters campus.[2]

At the trial, Sprint elicited from its own witnesses testimony that a number of identified company workers who were over the age of 40 had *not* been terminated in the RIF.[3] This exculpatory evidence suggested that the company in fact had dealt fairly with workers above that age. Although some of the non-dismissed workers in question had not worked under Supervisor Reddick, the *in limine* Order precluded Mendelsohn from responding with evidence of discrimination against other older workers outside her immediate unit. The jury returned a verdict in favor of the employer.

The Tenth Circuit reversed. It held the admissibility of the testimony of the five disputed witnesses was governed by the rule that testimony regarding discrimination against other workers is generally admissible if it is "'logically or reasonably' tied to the decision to terminate Mendelsohn."

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[1] Sprint argued this per se rule based on *Aramburu v. The Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997). (Pet. App. 2a).

[2] Pet. App. 3a, n. 1.

[3] (Exs. 3, 4) (Tr. 263-267).

(quoting *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 n. 2 (10th Cir. 1990)). The "[b]lanket pretrial evidentiary exclusio[n]" imposed by the district court was inconsistent with the requisite record-specific approach. After reviewing the substance of the proffered testimony of the disputed witnesses, the court of appeals concluded, "In this case, the other employees' testimony is logically tied to Sprint's alleged motive in selecting Mendelsohn to the RIF." (Pet. App. 9a).

Nature of the Excluded Testimony

Both the trial and appellate court had the entire depositions of the 5 proffered witnesses to see how their testimony "logically tied to" Sprint's motive as to Mendelsohn. All 5 had worked at (or near) the same Sprint headquarters in Kansas City, as Mendelsohn, and all had been dismissed within a year of Mendelsohn's termination. Bonnie Hoopes had been fired on the same day as Mendelsohn, and Sharon Miller had been fired on the very next day. (B. Hoopes at 49; Miller at 87). Several witnesses testified to overtly age-biased remarks that had been made by various supervisors at the facility.[4]

The circumstances in which those 5 witnesses had been dismissed was relevant in several specific ways to Mendelsohn's discrimination claim. A partial listing includes:

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[4] Bonnie Hoopes' supervisor, "told me I was too old for the job." (92-95); Sharon Miller's supervisor complained of "too many older people" in the department, including Yvonne Wood (25-26; 29-33; 45-47; 50; 58). Miller's supervisor was waiting for layoffs to clean the department. (*Id.*, 27; 59).

(1) Prior to her dismissal Mendelsohn had received uniformly high ratings on the company's "Numeric" evaluations, which were disclosed to employees.[5] Sprint changed in late 2001, to a "secret" set of evaluations, known as "Alpha" or "shadow" ratings, which were not to be disclosed to workers, but which also were not supposed to be used in making termination decisions.[6] Despite that rule, Mendelsohn, who had received an "Improvement Needed" rating under the secret alpha system, was dismissed on the basis of that alpha rating. (Tr. 978-81; 1020). Several of the other alleged discrimination victims would have testified that the "secret" "alpha" forced ranking system was also improperly used to dismiss them.[7]

(2) When Mendelsohn was dismissed, no objective reason was given to fire her. (Tr. 619). A "workforce reduction" was the supposed reason. (*Id.*). In fact her job was simply filled by another, younger worker.[8] Several of the other older employees similarly would have testified that they too were given the false prextual explanations for their dismissal.[9]

(3) Paul Reddick had no direct supervisory role over Ellen Mendelsohn from June 2002 through year end. (Tr. 1097-98).

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[5] Tr. 463-504; Exs. 63-69.

[6] Tr. 43-49 (testimony of Jo Renda).

[7] John Borel Depo. 40-42; 46-47; John Hoopes, at 37; Bonnie Hoopes, at 50-51.

[8] 33-year-old Whitney Siavelis replaced Mendelsohn (Tr. 176; Ex. 4). She had never worked in MFS. (Tr. 1184).

[9] B. Hoopes (50-51); J. Hoopes (34-36); John Borel (34-36).

Jim Fee, Mendelsohn's immediate supervisor, who rated her performance highly in 2002 and had talked of firing younger co-worker Mike Bauerle (Tr. 509), was **never** consulted about whom to dismiss (Tr. 832-34). The decision was made by Reddick, who knew far less about Mendelsohn's work.[10] Similarly, John Borel testified his supervisor said "she was forced to give him" an adverse rating. (40-42).

(4) At trial, a Sprint witness testified that upper-level company management "had no idea" about the ages of the workers who were being terminated.[11] This was so, they claimed, despite age data contained within various exhibits. (Exs. 3; 4; Tr. 127-131). In the absence of such knowledge, those managers could not have known (so they asserted) that when Mendelsohn was dismissed she was the oldest manager in her unit. (Tr. 1027). Yvonne Wood would have testified, to the contrary, that she inadvertently received a spreadsheet listing the ages of the workers to be dismissed, and it was distributed to her supervisors. When that inculpatory spreadsheet was inadvertently given to the witness, company officials had demanded that it be returned.[12]

(5) The company's official "**mandatory**" "Displacement Guidelines" provided that a worker's length of service was to be considered in selecting employees to be dismissed in the

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[10] Reddick admitted he personally did not have day-to-day supervisor responsibility for Mendelsohn during all of 2002. (Tr. 1097-98).

[11] Blessing, at 1027; 1045.

[12] Wood, at 48-51; 77-78.

RIF.[13] Mendelsohn had far more seniority than the workers who were retained in her unit.[14] But Jo Renda testified that length of service "is just a number." (Tr. 124). Several of the other alleged discrimination victims would have testified that they also were dismissed and replaced by younger lesser experienced employees, despite having greater length of service.[15]

In short, Ellen Mendelsohn was falsely portrayed as an isolated case -- the one supposedly "weaker" worker being RIF'd. Defendant even told the jury Ellen Mendelsohn "was the only person over 40 without a job because of this reduction in force." (Tr. 1364) But "age" motivation becomes "more probable" by **receiving** evidence that shows other older employees over 40 suffered Ms. Mendelsohn's fate in the same RIF; under the same policies. The jury expects to see a "pattern" of older employee dismissals, and when they don't, it is easier to accept defendant's non-discriminatory explanations.

To compound the unfairness, with plaintiff robbed of allowable evidence of Sprint's "pattern" of dismissals of well-performing older workers, defendant had free rein to argue:

> "There is usually some sort of pattern to those actions that tends to show age discrimination. There is none of that here. There is absolutely no evidence that Paul

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[13] Ex. 17 (Resp. App.)

[14] Tr. 123-24; 208-209.

[15] Bonnie Hoopes at 82-83; John Hoopes at 25-29.

> Reddick ever did anything based on age in his career at Sprint. (Tr. 1345-46).

The only reason there was no evidence of the traditional "pattern" is it was wrongly excluded. But the unfair drumbeat about Reddick was pounded out again (Tr. 1364):

> This is where you would see a pattern if somebody is an age discriminator . . . . If Paul Reddick was just walking around making decisions based on age, he would have gotten rid of the older employees ....

Defense counsel also was able to argue from spreadsheets admitted into evidence that younger employees in totally dissimilar jobs to plaintiff – and not supervised by Reddick – were also RIF"d; and that dissimilar older employees – not supervised by Reddick – were "accepted into his department as part of the reduction in force." (Tr. 1363-64). The *Mendelsohn* Opinion insightfully points up the unfair whipsaw wrought by the evidentiary exclusions.

Without testimony from other similarly situated employees, who similarly suffered sudden drops in performance evaluations after the "bell curve" forced ranking, the defendant was able to dismiss it as "a red herring." (Tr. at 1357) But the fact the new forced ranking system was secretly misused adversely against not only Ellen Mendelsohn – but also Bonnie Hoopes, John Hoopes and John Borel – makes a finding of "procedural irregularities" or pretext "more probable" than without the evidence.

Pretrial Conference Jan. 29, 2007: Sprint Would Not Be Calling Additional Witnesses Upon Retrial

This case was set for trial on February 6, 2007. In the Pretrial Conference held January 29, 2007, the court announced that the evidence submitted to the Tenth Circuit would be "frozen," meaning no additional discovery nor supplementation of Rule 26 witness and exhibit lists. Sprint did not object. Sprint did not intend to call any witnesses to contradict the testimony of the 5 witnesses proffered by plaintiff, because none had been listed in required Rule 26 Disclosures. Plaintiff years ago had listed all such witnesses on her disclosures.

REASONS FOR DENYING THE WRIT

This case presents a routine, fact-bound application of the generally accepted rule that anecdotal evidence of other discriminatory acts or remarks may, in some but not all cases, be relied on to prove that a particular employment action was motivated by an impermissible purpose.

Petitioner suggests that circuit courts have fashioned special legal rules for a distinct category of anecdotal evidence, which those courts label "me, too" evidence.[16]

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[16] It is unclear whether by "'me, too' evidence" petitioner means: (1) any testimony about discrimination against a witness (other than the plaintiff); (2) testimony about discrimination against a witness (other than the plaintiff) where the witness and the plaintiff were (assertedly) discriminated against by different officials (that would be "'me too, but someone else did it' evidence"); or (3) testimony about discrimination against a witness (other than the plaintiff) where the witness and the plaintiff were (assertedly) discriminated

According to petitioner the Tenth Circuit recognizes the existence of something it labels "me, too" evidence, and requires that such evidence be admitted in all cases; other circuits supposedly also utilize that nomenclature, but have adopted a per se bar to "me, too" evidence.

As we explain below, this characterization of the holdings of the Tenth and other circuits is incorrect. Petitioner's description of the language of those decisions also is not correct. Petitioner suggests there is a substantial body of appellate decisions referring to something federal judges call "me, too" evidence. The widespread use of such a phrase by the courts of appeals, if it indeed occurred, might at least suggest those courts were addressing some distinctive type of evidence which they regarded as presenting a recurring, discrete legal question. Petitioner suggests that has indeed occurred, quoting the phrase "me, too" evidence about 40 times in its petition, including in summaries of federal court decisions. In fact, however, **not a single one** of the decisions cited by petitioner ever uses that phrase. The only actual usage of this phrase identified by petitioner is in a 1996 book edited by petitioner's own counsel.[17]

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against by different officials *and* there were no significant similarities or other connections between the two asserted acts of discrimination.

[17] 1 B. Lindemann & P. Grossman, Employment Discrimination Law 30 (3d ed. 1996). The editor in-chief of the book is Paul W. Cane, Jr., the counsel of record for petitioner. *Id.* at xix. That book referred to "so-called 'me, too' evidence," without explaining *who* had so characterized the type of evidence in question. The footnotes in the book quote the phrase "me, too" in the parenthetical summaries of four federal decisions. None of those

I. The Tenth Circuit Has Not Adopted A Per Se Rule Requiring Admission Of All Anecdotal Evidence Of Other Discriminatory Acts.

The Tenth Circuit, like other courts of appeals, addresses on a case-by-case basis the relevance of anecdotal evidence of other discrimination. In the Tenth Circuit, as elsewhere, whether the anecdotal evidence is about actions or statements by an official different than the plaintiff's own supervisor is *a factor* bearing on the relevance of that evidence, but that circumstance is not the sole factor considered and is not invariably dispositive.

Petitioner asserts the Tenth Circuit always *requires* the admission of any and all anecdotal evidence involving an official other than the supervisor of the plaintiff. (Pet., 5, 6, 15, 21). Not true. For 17 years the Tenth Circuit, in a manner consistent with the approach in other circuits, has held that anecdotal evidence (including evidence regarding such other officials) is relevant only if the plaintiff can show that the evidence "could logically or reasonably be *tied to* the [allegedly discriminatory] decision." *Spulak v. K Mart Corporation*, 894 F.3d 1150, 1156 n. 2 (10th Cir. 1990)

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cases, however, used the phrase at all. *Id.* at 30 nn. 115-17. We have been unable to find any federal decision before the publication of this book that in fact used this phrase.

This book apparently uses the phrase "'me, too' evidence" to refer to any testimony about discrimination against a person other than the plaintiff, including asserted discrimination by the same supervisor. See n. --, *supra*. Much of the petition would make no sense, however, if that is what petitioner means by "'me, too' evidence."

(quoting *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988))(emphasis added).

In *Spulak* the Tenth Circuit upheld the decision of the district court to admit anecdotal evidence regarding an official other than the plaintiff's supervisor. The court of appeals did not (as petitioner suggests) hold the admission of that evidence was mandatory, but ruled only that the district judge in admitting the evidence had not abused his discretion. *Id.*, at 1156. The Tenth Circuit recognized the significance of the fact that two different supervisors were at issue,[18] but concluded that the district judge could find that circumstance was outweighed, *inter alia*, by the similarity of "the circumstances under which" the plaintiff and the witness were fired. 894 F.2d at 1156 n. 2.

On the other hand, applying the same "tied to" requirement, the Tenth Circuit approved the exclusion of anecdotal evidence in *Curtis v. Oklahoma City Public Schools Board of Education*, 147 F.3d 1200 (10th Cir. 1998). In upholding the exclusion of that evidence, the court of appeals noted *inter alia* that the witness in question had largely (although not exclusively) been under the supervision of a different official. 147 F.3d at 1218. In *Curtis*, in addition to this factor, there were "a number of dissimilarities" between the situation of the plaintiff and that of the proffered witness. Similarly, in *Coletti v. Cudd Pressure Control*, 165 F.3d 767 (10th Cir. 1999), the Tenth Circuit upheld the decision of the district court to exclude the testimony of a former employee who asserted that he (like the plaintiff in that case) had been retaliated against for complaining about discrimination. The

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[18] 894 F.2d at 1156 n. 2 ("*Although* they worked under a different district manager")(emphasis added).

court of appeals reiterated the "tied to" requirement, making clear that evidence regarding the treatment of other employees was sometimes but not invariably relevant:

> The testimony of other employees about their treatment by the defendant employer is relevant to the issue of the employer's discriminatory intent *if* the testimony establishes a pattern of retaliatory behavior or tends to discredit the employer's assertion of legitimate motives.

165 F.3d at 776 (emphasis added). With regard to the particular anecdotal evidence in that case, the Tenth Circuit held that this standard had not been met. The district judge, the court of appeals ruled, could reasonably have concluded that the proffered testimony was not sufficiently reliable and probative. *Id.*

Mendelsohn is an unremarkable application of this record-specific approach. The panel below reiterated the "tied to" requirement, emphasizing that testimony regarding the treatment of other employees is not always relevant, but rather is relevant when it "establishes a pattern of [discriminatory] behavior or tends to discredit the employer's assertion of legitimate motive." (Pet. App. 6a). The court of appeals concluded, "*In this case*, the other employees' testimony is logically tied to Sprint's alleged motive in selecting Mendelsohn to the RIF." (*Id.*, at 9a) (emphasis added).

The Tenth Circuit identified 5 considerations that tied the testimony of those other employees to Mendelsohn's claim. Because of those factors, the court of appeals reasoned, the proffered testimony supported — although not conclusively — Mendelsohn's efforts to discredit the employer's proffered

explanation for the decision to terminate Mendelsohn: (1) The decision to terminate Mendelsohn was not an isolated dismissal initiated by her supervisor; it was part of the same ongoing "company-wide RIF" that led to the dismissal of the other employees. (*Id.* at 10a). (2) The other employees, all of whom — like Mendelsohn — worked at the same Sprint headquarters in Kansas City, had been terminated within a year of Mendelsohn's dismissal (*Id.*); One proffered witness (Bonnie Hoopes) had been dismissed on the same day as Mendelsohn, and another (Sharon Miller) the very next day. (See Stmt. of Case, supra); (3) The criteria used to select for dismissal both Mendelsohn and the proffered witnesses were similar.[19] (Pet. App. at 10a); (4) A company witness (HR Manager Jo Renda) had put the treatment of "other employees" in dispute by testifying on behalf of the defendant that there were examples of other Sprint employees who were not dismissed, identifying a number of workers over 40 who (like the proffered witnesses) did not work under Mendelsohn's supervisor or Reddick. (*Id.* at 11a). (5) The proffered testimony (including the testimony about age-biased remarks by supervisors) tended to show "an atmosphere of age discrimination." (*Id.* at 14a).

The Tenth Circuit opinion, far from insisting that all anecdotal testimony must invariably be admitted, held only that the district court *in this case* had erred in adopting a "[b]lanket pretrial evidentiary exclusio[n]" of any testimony by workers who served under an official other than Mendelsohn's own supervisor. (*Id.* at 14a). The panel emphasized that even in the instant case the district court on

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[19] The company-wide mandatory Displacement Guidelines (Ex. 17); The "Numeric" to "Alpha" Performance Management System.

remand retained the power to limit on a more narrow basis the testimony of those witnesses:

- These other employees should have been allowed to take the stand and testify subject, of course, to any district court ruling regarding the proper use and limitations of such testimony. (*Id.* at 13a).

- To be sure, the district court retains its power to limit cumulative and marginally relevant testimony. (*Id.* at 15a).

- Nothing in our ruling is intended to limit the district court's discretion during trial to issue . . . rulings concerning the proper purpose for which Mendelsohn's evidence may be introduced. (*Id.* at 16a, n. 6).

The dissenting opinion illustrates the fact-bound nature of the dispute in the court of appeals. The dissenting judge wrote, "I readily admit that the court would not have erred in admitting the evidence." (*Id* at 20a). The dissent argued only that the testimony of the 5 co-workers was not very persuasive (*Id.* at 20a), and that the decision to admit or exclude that evidence should thus have been left to the district judge. (*Id.*).

The petition describes the anecdotal evidence in this case in terms which omit the probative aspects of that evidence (Pet. at 3-4). The Tenth Circuit, relying on important aspects of that evidence ignored by petitioner, concluded that it was indeed relevant. These fact-bound disputes about the persuasiveness of the excluded testimony do not present an issue warranting review by this Court.

II. The Decision Of The Tenth Circuit Is Not In Conflict With The Standard Applied In Other Circuits.

The Tenth Circuit's case-specific approach, assessing in each instance whether and how anecdotal testimony would provide support for a plaintiff's claim of discrimination, is consistent with the practice in other circuits.

The First Circuit took the same approach in *Cummings v. Standard Register Co.*, 265 F.3d 56 (1st Cir. 2001):

> [E]vidence of a discriminatory "atmosphere" may sometimes be relevant in showing corporate state-of-mind at the time of that termination. . . . [The employer] challenges the relevancy of the testimony on the ground that it covered different time periods, different supervisors, and different areas of the company. It is true that evidence of discrimination can be "too attenuated" to justify submission. . . . However, "evidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific claim [at issue.]

265 F.3d at 63 (quoting *Conway v. Electro Switch Co.*, 825 F.2d 593, 597-98 (1st Cir. 1987)). The First Circuit in *Cummings* concluded that under the particular circumstances of that case the testimony of co-workers, even though not involving the same supervisor as that of the plaintiff, could "provid[e] a basis for reasonable inferences related to the plaintiff's claim." 265 F.3d at 63.

In the Eighth Circuit, the admissibility of such anecdotal testimony of discrimination against other employees is

assessed in light of the circumstances of each case. *Compare Philip v. ANR Freight Systems, Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991)(overturning exclusion of testimony concerning discrimination against other employees)[20] and *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 156 (8th Cir. 1990)(same),[21] *with LaClair v. City of St. Paul*, 187 F.3d 824, 828 (8th Cir. 1999)(upholding exclusion of testimony concerning discrimination against other employees), and *Callanan v. Runyun*, 75 F.3d 1293, 1298 (8th Cir. 1996) (same).

> Circumstantial proof of discrimination [against other workers] typically includes unflattering testimony about the employer's history and work practices . . . . [S]uch background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1003 (8th Cir. 1988).

Similarly, in the Seventh Circuit the admissibility of testimony regarding discrimination against other employees

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[20] 945 F.2d at 1056 ("an employer's background of discrimination is indeed relevant to proving a particular instance of discrimination.")

[21] 900 F.2d at 155-56 ("Because an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial.")

depends on the particular circumstances of each case. Judge Posner observed in *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986),

> Given the difficulty of proving employment discrimination — the employer will deny it, and almost every worker has some deficiency on which the employer can plausibly blame the worker's troubles — a flat rule that evidence of other discriminatory acts by . . . the employer can never be admitted . . . would be unjustified. Such evidence will often flunk Rule 403 because the acts are remote in time or place . . . *but not in all cases, and not in this one*. (emphasis added).

797 F.2d at 1423. Applying this case-specific approach, the Seventh Circuit in *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93 (7th Cir. 1985), held that testimony by two co-workers that they (like the plaintiff) were the victims of age discrimination provided support for the plaintiff's own claim. 770 F.3d at 97-98.

Petitioner asserts the Third Circuit has held that testimony regarding the treatment of other employees is *never* admissible where those employees were subordinates of an official other than the plaintiff's own supervisor. (Pet. 11, 14). The only Third Circuit decision cited by petitioner, however, is the summary affirmance in *Moorhouse v. Boeing Co.*, 639 F.2d 774 (3d Cir. 1980). The Third Circuit decision relied on by petitioner reads, in its entirety, as follows: "Affirmed." Obviously, that decision contains no rule of law at all; indeed, it is impossible to ascertain what issues were even raised in the appeal.

The Third Circuit did address this issue in *Glass v. Philadelphia Electric Co.*, 34 F.3d 188 (3d Cir. 1994),

endorsing the record-specific standard utilized in the First, Seventh and Eighth Circuits. *Glass* overturned the action of the district judge in prohibiting testimony about prior discrimination against the plaintiff by other officials at a different facility:

> The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives . . . . Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices . . . . In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employee was more likely than not to have acted from an unlawful motive.

34 F.3d at 195 (quoting *Estes v. Dick Smith Ford, Inc.*, *supra*). The Third Circuit cited with approval the admission of such anecdotal testimony in *Hawkins v. Hennepin Technical Center*, *supra*, and *Hunter v. Allis-Chalmers*, *supra*. In *Becker v. Arco-Chemical Co.*, 207 F.3d 176 (3d Cir. 2000), the Third Circuit indicated agreement with

> numerous cases which have held that, as a general rule, evidence of a defendant's prior discriminatory treatment of a plaintiff *or other employees* is relevant and admissible . . . to establish whether a defendant's employment action against an employee was motivated by invidious discrimination. . . . . In those cases, the courts admitted the evidence because of the discriminatory nature of the prior conduct, which in

> turn tended to show the employer's state of mind or attitude toward members of the protected class.

207 F.3d at 194 n. 8 (emphasis added).

Petitioner asserts there is "clear dictum" in the Fourth Circuit precluding use of anecdotal testimony from workers who had different supervisors than the plaintiff. (Pet. 14). The case cited by petitioner, *Honor v. Booz-Allen & Hamilton, Inc.*,, 383 F.3d 180 (4th Cir. 2004), contains nothing to support this assertion. The portion of *Honor* cited by petitioner concerned a hostile work environment claim. The plaintiff did not claim he personally had been subject to racial harassment, but asserted that only other employees had been subject to such treatment. The Fourth Circuit, in rejecting that argument, simply applied established law requiring an harassment plaintiff to show that *his* environment was a hostile one. Honor's harassment claim did not turn on the motives of the employer, and thus the probativeness of anecdotal evidence to establish motive simply was not at issue in that case. Petitioner's reliance on *Honor*, explained only obliquely in footnote 4 of the Petition, evidently rests on that fact that the Fourth Circuit, after the signal "see also", cited two cases dealing with anecdotal testimony. 383 F.3d at 190. But that signal indicates that the court regarded the cited cases as only tangentially related to the question actually being decided.

In *Kozlowski v. Hampton School Bd.*, 77 Fed. Appx. 133 (4th Cir. 2003), on the other hand, the Fourth Circuit "cited favorably" a series of decisions in other circuits approving the use of "evidence of similar acts of discrimination, or other acts which reveal a discriminatory attitude." 77 Fed. Appx. at 147-48 (citing *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), *Hunter v. Allis-Chalmers Corp.*, 797 F.2d

1417 (7th Cir. 1986), and *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988)).

Petitioner relies heavily on the Second Circuit decision in *Haskell v. Kaman Corp.*, 743 F.3d 113 (2d Cir. 1984), which petitioner describes as "oft-cited." (Pet. 8). The dispute about the anecdotal evidence in *Haskell*, however, had nothing to do with the identity of the supervisors involved; the opinion does not even indicate whether the witnesses served under an official other than plaintiff Haskell's supervisor. The Second Circuit's objection in *Haskell* was not that the plaintiff was trying to rely on testimony by other alleged victims of discrimination, but that the plaintiff had called *too few* such witnesses. The plaintiff had sought to prove that discrimination was so widespread that it was the employer's standard operating procedure, and was therefore sufficient by itself to demonstrate that Haskell too was the victim of discrimination. *See Teamsters v. United States*, 431 U.S. 314, 362 (1977) (proof of systemic discrimination creates presumption of discrimination against all members of the targeted group). Proof of discrimination against other workers is a (if not *the*) method of proving such a systemic practice, but the Second Circuit concluded that Haskell had called too few such witnesses:

> The sample in the present case of ten terminations over an 11-year period is not statistically significant, particularly against a background indicating that most of the Company's many officers . . . were more likely than not in the protected age bracket (40 to 70 years) . . . . The courts have consistently rejected similar statistical samples as too small to be meaningful.

743 F.3d at 121. *Haskell* is "oft-cited" for the proposition that proof of systemic discrimination requires a larger sample

size, not for any rule about the identity of the supervisors involved.[22]

The Second Circuit in *Haskell* also objected that the testimony of the witnesses in question was insufficient to establish that even they had been the victims of discrimination:

> Some witnesses were improperly permitted to give subjective evaluations of their own and of their fellow officers' performance without furnishing the bases for their evaluations. . . . Two of the 10 discharged officers were never replaced. Five were replaced by *older* persons and one by a person only eight months the discharged officer's junior. Under these circumstances their testimony, aside from presenting unnecessary collateral issues, provided "no basis for an inference of discrimination."

743 F.2d at 121 (citation omitted; emphasis added). In *Mendelsohn*, on the other hand, petitioner has not (yet) questioned the sufficiency of the proffered testimony to prove that the witnesses were the victims of discrimination.[23]

The petition mischaracterizes the opinion in *Haskell* in a way that suggests that the passage quoted above actually

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[22] *E.g., Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536, 546 n. 5 (S.D.N.Y. 2005); *Weser v. Glen*, 190 F. Supp. 2d 384, 402 (E.D.N.Y. 2002); *Shkolnik v. Combustion Engineering, Inc.*, 856 F. Supp. 82, 87 (D.Ct. 1994).

[23] Petitioner's consistent position has been that "other employee" testimony is irrelevant if not connected to Reddick.

meant that proof of discrimination against the witnesses, however persuasive, would not support a finding that plaintiff Haskell was also a victim of discrimination. Omitting the court's explanation of the defects in that testimony, the petition recasts the holding of the Second Circuit as follows:

> "[T]heir testimony, aside from presenting unnecessary collateral issues, provided 'no basis for an inference of discrimination,'" *because the circumstances of the six others bore no logical relationship to the plaintiff.*

(Pet., 8) (emphasis added). Petitioner's "no logical relationship" explanation of the Second Circuit opinion is inaccurate; the defect in the testimony identified by the Second Circuit was not that the testimony (even if credible) bore no relationship to the plaintiff's claim of discrimination, but that the testimony was insufficient to show that even the witnesses themselves had been the victims of discrimination.

Petitioner asserts that the Sixth Circuit has adopted a per se rule excluding *all* anecdotal testimony involving an official other than the plaintiff's own supervisor. (Pet. 10-11). In *Williams v. Nashville Network*, 132 F.3d 1123 (6th Cir. 1997), the Sixth Circuit held that anecdotal evidence would be admissible if it had some "apparent connection" with the plaintiff's claim — a formulation similar to the Tenth Circuit "tied to" standard. 132 F.3d at 1130. The Sixth Circuit then listed six circumstances in that case which, taken in concert, convinced the court that the proffered testimony (about an earlier alleged incident of hiring discrimination) was not relevant: (1) the earlier incident occurred 6 years before the plaintiff was rejected for employment, (2) the earlier application involved a different position, (3) the two positions had different qualifications, (4) the two positions had distinct hiring requirements, (5) the two incidents did not involve

similar assertedly pretextual explanations, and (6) the applications were reviewed by different officials. 132 F.3d at 1130. The decision in *Williams* that the prior incident was not relevant was based on consideration of all these factors combined, together with the plaintiff's failure to point to any type of connection between the two asserted incidents of hiring discrimination. *Williams* cannot conceivably be read as adopting six (6) per se rules, under which every one of these factors would by itself, in all circumstances, bar anecdotal testimony. For example, even in petitioner's view, the fact that different positions were involved would not render irrelevant the testimony of that other applicant if the decisions had been made on the same day by the same supervisor giving the same (assertedly pretextual) explanation. The fact that different officials were involved in *Williams* was simply one of six factors, none more conclusive than any of the others, relied on by the court.

The other Sixth Circuit case relied on by petitioner, *Schrand v. Federal Pacific Electric Co.*, 851 F.3d 152 (6th Cir. 1988), far from establishing any per se rule limiting anecdotal testimony to evidence regarding the plaintiff's own supervisor, instead formulates the very "tied to" standard cited and adopted by the Tenth Circuit in *Spulak* and applied by the Tenth Circuit in *Mendelsohn*. In determining the admissibility of anecdotal testimony, the question was whether there was "evidence from which the alleged statements of the witnesses could logically or reasonably be tied to the decision [in dispute."] 851 F.2d at 152. In holding such standard was not met in *Schrand*, the Sixth Circuit noted that the two witnesses had worked in New Jersey and New Mexico, "places far from the plaintiff's place of employment" in Ohio,

and had served under different supervisors.[24] It was that combination of circumstances, together with the failure of the plaintiff to point to some sort of relationship among these incidents, that led to the Sixth Circuit's conclusion that the testimony in *Schrand* was inadmissible. As in *Williams*, *Schrand* does not purport to adopt *several* per se rules. Instead it merely considers the combined effect of several circumstances. If each of the factors in *Schrand* were itself a per se rule, that decision would bar introduction of evidence that a single manager, on the same day and giving the identical (assertedly pretextual) explanation, had fired a series of over-40 employees, so long as the simultaneously-dismissed subordinates had worked in several different states.

The Fifth Circuit has dealt with anecdotal evidence in a somewhat ad hoc manner, endorsing its use in some cases, *e.g. Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1110 (5th Cir. 1995)[25], and *Harpring v. Continental Oil Co.*, 628

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[24] All of Mendelsohn's proffered witnesses worked in Kansas City.

[25] 49 F.3d at 1109-10 ("To the extent that [the defendant] contests the admission of evidence of age discrimination against other employees, it misconstrues the law. There is no prescription of evidence of discrimination against other members of the plaintiff's protected class; to the contrary, such evidence may be highly probative, depending on the circumstances.") *Shattuck* cites *Hawkins v. Hennepin Technical Center*, 900 F.2d 152 (8th Cir. 1990).

F.2d 406 (5th Cir. 1980)[26], while rejecting that evidence in others.

The Fifth Circuit decision in *Wyvill v. United Companies Life Insurance Co.*, 212 F.3d 296 (5th Cir. 2000), illustrates the fact-bound nature of deciding relevance of anecdotal testimony. In *Wyvill* the same supervisor had in fact been involved in terminating both a plaintiff and at least one of the witnesses who testified about his own earlier discriminatory dismissal. 212 F.3d at 303 (supervisor Phillips was involved in the terminations of both the witness and plaintiff Waldrop); *see id.* (plaintiff and one or more witnesses had all been supervised at one time by D.C. Brantley). A second plaintiff had a different immediate supervisor than his witnesses, but those witnesses did have experience with a manager (Spann) who had participated in the decision to fire that plaintiff. 212 F.3d at 303. The Fifth Circuit concluded that the anecdotal testimony of these witnesses should have been excluded, despite the fact that the witnesses had testified about several of the very company officials involved in terminating the two plaintiffs. The court of appeals held the testimony was inadmissible because the witnesses themselves had held different jobs with different duties than the plaintiffs, had been dismissed under different circumstances with different explanations, and in several instances did not even work for the same company as the plaintiff. 212 F.3d at 302-303. The anecdotal evidence in *Wyvill* thus included evidence regarding the actual decisionmakers involved in dismissing the two plaintiffs in that case; the Fifth Circuit decision rejecting that evidence necessarily rested on other considerations.

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[26] 628 F.2d at 409 ("It is clear that the testimony of the similarly situated employees and the reasons for their discharge are relevant in proving a pattern and practice of age discrimination.")

In sum, the Tenth Circuit has not adopted a per se rule requiring admission of all anecdotal testimony from witnesses who work under a different supervisor than the plaintiff, and the other court of appeals do not apply a blanket prohibition — regardless of all other circumstances — to all anecdotal testimony from such witnesses. In practice the evaluation of anecdotal evidence remains, as it should be, a record-bound process turning on the various circumstances of each particular case.

III. *Mendelsohn* Simply Does Not Hold That Anecdotal Evidence Always Must Be Admitted. There Is No Circuit "Conflict" On This Fact-Bound Determination.

As fully explained in Parts I and II herein, *Mendelsohn* does not announce a "per se" rule requiring admissibility. Thus, the false premise underlying Point II of the petition disappears. Second, Petitioner's hypothetical "undue delay" arguments also disappear for the case-specific reason here that Petitioner announced it was not intending to call any new or additional witnesses upon retrial.[27]

The Tenth Circuit's law on Rule 403 is consistent with law everywhere in holding:

> In performing the 403 balancing, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. (Pet. App., at 15a).

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[27] *See* Statement of The Case, *supra*.

There was no proper Rule 403 "balancing" per the foregoing in the district court, but only arbitrary exclusion without hearing or adequate explanation — a double whammy against plaintiff: (1) No acknowledgment of the case law holding anecdotal evidence from other employees is "generally" admissible; (2) compounded by imposing a rigid same supervisor/same decisionmaker test.

The district court erroneously applied a "per se" rule from a misreading of *Aramburu v. The Boeing Company*, 112 F.3d 1398 (10th Cir. 1997) — whereas *Aramburu* itself establishes that only "in the context of the discriminatory discipline action" cases is it required that "plaintiffs seeking to present testimony of other employees show they shared the same supervisor." Because the district court "excluded the testimonial evidence based on its erroneous conclusion that *Aramburu* controlled the fate of the evidence in this case," (*Id.*, 15a, n. 4), the panel majority was obligated to correct the error to maintain consistency in a line of Tenth Circuit case law that is not at issue in this Petition. (*Id.*, at 7a-10a).

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Dated: May 11, 2007

Respectfully submitted,

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APPENDIX

APPENDIX A

DISPLACEMENT GUIDELINES

These guidelines for selecting employees for reduction are listed in descending order of importance.

- Identify all critical positions, or positions that will be unaffected.

- Determine through a workforce analysis the functions or positions to be eliminated and specific individuals to be displaced as a result of these reductions.

- When reviewing same site multiple job incumbents, the intent is to retain the best qualified personnel. Formally consider the following:

  — Assess the background qualifications of each incumbent on the basis of the new position (due to changes in work distribution, position accountabilities may have changed).

  — Review and compare recent performance ratings, attendance, total contribution to the position and the company, and critical skill sets or knowledge.

  — Review any corrective action notices or warnings.

  — Review and compare length of service within the company and within the position.

— Review planned displacement action with the Law Department and Corporate Employee Relations in advance for disparate impact analysis.

NOTE: DOCUMENT AND RETAIN THE INFORMATION USED TO MAKE THE RETENTION DECISION.

Updated September 2001
Corporate Employee Relations

Blessing
Deposition Exhibit
No. 17
Date: 2-19-04

CLERK U.S. DISTRICT COURT
Exhibits:
P 17 D ____
Case No. 03-2429

CONFIDENTIAL SPR-WO10962

APPENDIX B

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCY AND ITS LIMITS
Fed. R. Evid. 404

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

* * *

(b) **Other Crimes, Wrongs, or Acts.** — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006.)